

1 KAMALA D. HARRIS
Attorney General of California
2 LINDA K. SCHNEIDER
Supervising Deputy Attorney General
3 ADRIAN R. CONTRERAS
Deputy Attorney General
4 State Bar No. 267200
110 West "A" Street, Suite 1100
5 San Diego, CA 92101
P.O. Box 85266
6 San Diego, CA 92186-5266
Telephone: (619) 645-2634
7 Facsimile: (619) 645-2061
E-mail: Adrian.Contreras@doj.ca.gov
8 *Attorneys for Complainant*

9
10 **BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE BUREAU OF AUTOMOTIVE REPAIR
STATE OF CALIFORNIA**

11
12 In the Matter of the Accusation Against:

Case No. 79/12-172

13 **M & C SMOG TEST ONLY**
14 **MOISES ORTIZ FERNANDEZ, OWNER**
6111 Columbus Avenue
15 Riverside, CA 92504

ACCUSATION

SMOG CHECK

16 **Automotive Repair Dealer Registration No.**
17 **ARD 263478**

18 **Smog Check - Test Only Station License No.**
19 **TC 263478,**

20 **and**

21 **CRYSTIAN DAVID GUERRERO**
18780 Alderbrook Drive
22 Riverside, CA 92508

23 **Advanced Emission Specialist Technician**
24 **License No. EA 632279**

25 Respondents.

1 Complainant alleges:

2 **PARTIES**

3 1. John Wallauch ("Complainant") brings this Accusation solely in his official capacity
4 as the Chief of the Bureau of Automotive Repair, Department of Consumer Affairs.

5 **M & C Smog Test Only; Moises Ortiz Fernandez, Owner**

6 2. On or about October 14, 2010, the Director of Consumer Affairs ("Director") issued
7 Automotive Repair Dealer Registration Number ARD 263478 ("Registration") to Moises Ortiz
8 Fernandez, Owner of M & C Smog Test Only ("Respondent Fernandez"). The Registration was
9 in full force and effect at all times relevant to the charges brought herein and will expire on
10 October 31, 2012, unless renewed.

11 3. On or about November 5, 2010, the Director issued Smog Check - Test Only Station
12 License Number TC 263478 ("Smog Check Station License") to Respondent Fernandez. The
13 Smog Check Station License was in full force and effect at all times relevant to the charges
14 brought herein and will expire on October 31, 2012, unless renewed.

15 **Crystian David Guerrero**

16 4. On or about July 15, 2010, the Director issued Advanced Emission Specialist
17 Technician License Number EA 632279 ("Technician License") to Crystian David Guerrero
18 ("Respondent Guerrero"). The Technician License was in full force and effect at all times
19 relevant to the charges brought herein and will expire on August 31, 2012, unless renewed.

20 **JURISDICTION**

21 5. This Accusation is brought before the Director under the authority of the following
22 laws.

23 6. Section 9884.13 of the Business and Professions Code ("Code") provides, in pertinent
24 part, that the expiration of a valid registration shall not deprive the Director of jurisdiction to
25 proceed with a disciplinary proceeding against an automotive repair dealer or to render a decision
26 invalidating a registration temporarily or permanently.

27 ///

28 ///

1 7. Section 118 of the Code states:

2 "...

3 "(b) The suspension, expiration, or forfeiture by operation of law of a license issued by a
4 board in the department, or its suspension, forfeiture, or cancellation by order of the board or by
5 order of a court of law, or its surrender without the written consent of the board, shall not, during
6 any period in which it may be renewed, restored, reissued, or reinstated, deprive the board of its
7 authority to institute or continue a disciplinary proceeding against the licensee upon any ground
8 provided by law or to enter an order suspending or revoking the license or otherwise taking
9 disciplinary action against the licensee on any such ground.

10 "...."

11 8. Section 44002 of the Health and Safety Code provides, in pertinent part, that the
12 Director has all the powers and authority granted under the Automotive Repair Act for enforcing
13 the Motor Vehicle Inspection Program.

14 9. Section 44072.6 of the Health and Safety Code provides, in pertinent part, that the
15 expiration or suspension of a license by operation of law, or by order or decision of the Director,
16 or a court of law, or the voluntary surrender of the license shall not deprive the Director of
17 jurisdiction to proceed with disciplinary action.

18 STATUTORY PROVISIONS

19 10. Section 22 of the Code states:

20 "(a) 'Board' as used in any provisions of this Code, refers to the board in which the
21 administration of the provision is vested, and unless otherwise expressly provided, shall include
22 'bureau,' 'commission,' 'committee,' 'department,' 'division,' 'examining committee,' 'program,' and
23 'agency.'

24 "(b) Whenever the regulatory program of a board that is subject to review by the Joint
25 Committee on Boards, Commissions, and Consumer Protection, as provided for in Division 1.2
26 (commencing with Section 473), is taken over by the department, that program shall be
27 designated as a 'bureau.'"

1 11. Section 477 of the Code provides, in pertinent part, that "Board" includes "bureau,"
2 "commission," "committee," "department," "division," "examining committee," "program," and
3 "agency." "License" includes certificate, registration or other means to engage in a business or
4 profession regulated by the Code.

5 12. Section 9884.7 of the Code states:

6 "(a) The director, where the automotive repair dealer cannot show there was a bona fide
7 error, may deny, suspend, revoke, or place on probation the registration of an automotive repair
8 dealer for any of the following acts or omissions related to the conduct of the business of the
9 automotive repair dealer, which are done by the automotive repair dealer or any automotive
10 technician, employee, partner, officer, or member of the automotive repair dealer.

11 "(1) Making or authorizing in any manner or by any means whatever any statement written
12 or oral which is untrue or misleading, and which is known, or which by the exercise of reasonable
13 care should be known, to be untrue or misleading.

14 "...

15 "(4) Any other conduct that constitutes fraud.

16 "..."

17 "(c) Notwithstanding subdivision (b), the director may suspend, revoke, or place on
18 probation the registration for all places of business operated in this state by an automotive repair
19 dealer upon a finding that the automotive repair dealer has, or is, engaged in a course of repeated
20 and willful violations of this chapter, or regulations adopted pursuant to it."

21 13. Section 44072.2 of the Health and Safety Code states:

22 "The director may suspend, revoke, or take other disciplinary action against a license as
23 provided in this article if the licensee, or any partner, officer, or director thereof, does any of the
24 following:

25 "(a) Violates any section of this chapter [the Motor Vehicle Inspection Program (Health
26 and Safety Code, § 44000, et seq.)] and the regulations adopted pursuant to it, which related to the
27 licensed activities.

28 "..."

"(c) Violates any of the regulations adopted by the director pursuant to this chapter.

"(d) Commits any act involving dishonesty, fraud, or deceit whereby another is injured.

“ . . . ”

14. Health & Safety Code section 44072.10 states, in pertinent part:

“ . . .

“(c) The department shall revoke the license of any smog check technician or station licensee who fraudulently certifies vehicles or participates in the fraudulent inspection of vehicles. A fraudulent inspection includes, but is not limited to, all of the following:

“ . . .

“(4) Intentional or willful violation of this chapter or any regulation, standard, or procedure of the department implementing this chapter.”

15. Section 44072.8 of the Health and Safety Code states:

"When a license has been revoked or suspended following a hearing under this article, any additional license issued under this chapter in the name of the licensee may be likewise revoked or suspended by the director."

COSTS

16. Section 125.3 of the Code provides, in pertinent part, that the Director may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

FACTUAL BACKGROUND

17. In or about January 2012, the Bureau initiated an investigation of Respondent Fernandez's smog check station based on a review of information from the Bureau's Vehicle Information Database ("VID"), which indicated that Respondent Fernandez or his employees may have been engaging in fraudulent smog check inspections.

18. On January 19, 2012, a representative of the Bureau conducted a detailed review of the VID data for all smog inspections performed at Respondent Fernandez's facility for the period of July 26, 2011, through October 24, 2011. The representative found that the VID recorded the

1 same diagnostic trouble code ("code") during the OBD II test¹ of the five vehicles identified
2 below regardless of the make or model of the vehicle. The representative obtained information
3 indicating that the codes were not applicable to these vehicles. The VID data also showed that
4 Respondent Guerrero performed the inspections on the vehicles using a method known as "clean
5 plugging,"² resulting in the issuance of fraudulent certificates of compliance for the vehicles.

Date & Time of Inspection	Vehicle Certified & License or VIN No.	Certificate No.
1. 9/13/2011 1645 - 1700	2003 Dodge Viper; License No. SSFUNDS	WZ158569C
2. 10/20/2011 1531 - 1544	2003 Dodge Durango; License No. 5MWN735	WZ844014C
3. 10/22/2011 1126 - 1133	1996 Honda Accord; VIN No. 1HGCD5691TA214726	WZ844030C
4. 10/22/2011 1219 - 1224	2001 Ford Focus; License No. 5GQK352	WZ844033C
5. 10/22/2011 1228 - 1241	2001 Mitsubishi Eclipse; VIN No. 4A3AC44G71E182873	WZ844034C

FIRST CAUSE FOR DISCIPLINE

(Untrue or Misleading Statements)

19. Respondent Fernandez's Registration is subject to disciplinary action under Code section 9884.7, subdivision (a)(1) in that he made or authorized statements which he knew or in

¹ The On Board Diagnostic, generation II ("OBD II"), functional test is an automated function of the BAR-97 Emissions Inspection System analyzer ("EIS"). The EIS includes a computer based, five-gas analyzer that tests vehicles under simulated driving conditions to detect oxides of nitrogen, hydrocarbons, and carbon monoxide emissions. During the OBD II functional test, the technician is required to connect an interface cable from the EIS to a Diagnostic Link Connector (DLC) which is located inside the vehicle. Through the DLC, the EIS automatically retrieves information from the vehicle's on-board computer about the status of the readiness indicators, trouble codes, and the MIL (malfunction indicator light). If the vehicle fails the OBD II functional test, it will fail the overall inspection.

² Clean-plugging is the use of the OBD II readiness monitor status and stored code status of a passing vehicle for the purpose of illegally issuing a smog certificate to another vehicle that is not in compliance due to the noncompliant vehicle's failure to complete the minimum number of self tests, known as monitors, or due to the presence of a stored code that indicates an emission control system or component failure. Clean plugging occurs during the inspection of a vehicle that has an OBD II system. To clean plug a vehicle, the smog technician enters information into the EIS for the vehicle the technician wishes to certify and then plugs the OBD II system connection from the EIS into another vehicle that has a properly functioning OBD II system, rather than plugging the connection into the vehicle that was originally identified for testing.

1 the exercise of reasonable care should have known to be untrue or misleading as follows:

2 Respondent Fernandez's smog check technician, Respondent Guerrero, certified that the vehicles
3 identified in paragraph 18 above, had passed inspection and were in compliance with applicable
4 laws and regulations. In fact, Respondent Guerrero conducted the inspections on the vehicles
5 using clean-plugging methods in that he substituted or used a different vehicle(s) during the OBD
6 II functional tests in order to issue smog certificates of compliance for the vehicles, and did not
7 test or inspect the vehicles as required by Health and Safety Code section 44012.

8 SECOND CAUSE FOR DISCIPLINE

9 (Fraud)

10 20. Respondent Fernandez's Registration is subject to disciplinary action under Code
11 section 9884.7, subdivision (a)(4) in that Respondent Fernandez committed acts that constitute
12 fraud by issuing electronic smog certificates of compliance for the vehicles described in
13 paragraph 18 above, without performing bona fide inspections of the emission control devices
14 and systems on the vehicles, thereby depriving the People of the State of California of the
15 protection afforded by the Motor Vehicle Inspection Program.

16 THIRD CAUSE FOR DISCIPLINE

17 (Violations of the Motor Vehicle Inspection Program)

18 21. Respondent Fernandez's Smog Check Station License is subject to disciplinary action
19 under Health and Safety Code sections 44072.10 and 44072.2, subdivision (a), in that Respondent
20 Guerrero failed to comply with the following sections of that Code:

21 a. Section 44012: Respondent Fernandez failed to ensure that the emission control tests
22 were performed on the vehicles identified in paragraph 18 above, in accordance with procedures
23 prescribed by the department.

24 b. Section 44015: Respondent Fernandez issued electronic smog certificates of
25 compliance for the vehicles identified in paragraph 18 above, without ensuring that they were
26 properly tested and inspected to determine if they were in compliance with Health and Safety
27 Code section 44012.

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

FOURTH CAUSE FOR DISCIPLINE

(Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program)

22. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (c), in that Respondent Fernandez failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.35, subdivision (c)**: Respondent Fernandez issued electronic smog certificates of compliance for the vehicles described in paragraph 18 above, even though they had not been inspected in accordance with California Code of Regulations, title 16, section 3340.42.

b. **Section 3340.42**: Respondent Fernandez failed to ensure that the required smog tests were conducted on the vehicles described in paragraph 18 above, in accordance with the Bureau's specifications.

FIFTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud, or Deceit)

23. Respondent Fernandez's Smog Check Station License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that Respondent Fernandez committed dishonest, fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 above without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

SIXTH CAUSE FOR DISCIPLINE

(Violations of the Motor Vehicle Inspection Program)

24. Respondent Guerrero's Technician License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (a), in that Respondent Guerrero failed to comply with sections 44012 of that Code as follows: Respondent Guerrero failed to perform the emission control tests on the vehicles described in paragraph 18 above in accordance with procedures prescribed by the department.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SEVENTH CAUSE FOR DISCIPLINE

(Failure to Comply with Regulations Pursuant to the Motor Vehicle Inspection Program)

25. Respondent Guerrero's Technician License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (c), in that Respondent Guerrero failed to comply with provisions of California Code of Regulations, title 16, as follows:

a. **Section 3340.30, subdivision (a)**: Respondent Guerrero failed to inspect and test the vehicles described in paragraph 18 above in accordance with Health and Safety Code sections 44012 and 44035, and California Code of Regulations, title 16, section 3340.42.

b. **Section 3340.42**: Respondent Guerrero failed to conduct the required smog tests on the vehicles described in paragraph 18 above in accordance with the Bureau's specifications.

EIGHTH CAUSE FOR DISCIPLINE

(Dishonesty, Fraud, or Deceit)

26. Respondent Guerrero's Technician License is subject to disciplinary action under Health and Safety Code sections 44072.10 and 44072.2, subdivision (d), in that Respondent committed dishonest, fraudulent, or deceitful acts whereby another is injured by issuing electronic smog certificates of compliance for the vehicles described in paragraph 18 above without performing bona fide inspections of the emission control devices and systems on the vehicles, thereby depriving the People of the State of California of the protection afforded by the Motor Vehicle Inspection Program.

OTHER MATTERS

27. Pursuant to Code section 9884.7, subdivision (c), the Director may suspend, revoke or place on probation the registration for all places of business operated in this state by Respondent Fernandez upon a finding that Respondent Fernandez has, or is, engaged in a course of repeated and willful violations of the laws and regulations pertaining to an automotive repair dealer.

28. Pursuant to Health & Safety Code section 44072.8, if Respondent Fernandez's Smog Check Station License is revoked or suspended, the Director may likewise revoke or suspend any additional license issued under Chapter 5 of the Health and Safety Code in the name of Respondent Fernandez.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
1
1
1
1
1
2
2
:
:

5

6

- 8

2

•